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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Marguerite Owens Harrell, by her Parents, Allen W. Harrell and Irene Burk Harrell,
Petitioner,

v.

Wilson County Schools, Dr. W. O. Fields, Jr., Superintendent and North Carolina Department of Public Instruction, Dr. A. Craig Phillips, Superintendent
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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QUESTIONS PRESENTED

I. Whether assessment, evaluation and placement procedures comply with due process and the requirements of the Education of the Handicapped Act and its federal regulations where the evaluation forms were only partially completed, information was not obtained with regard to prior educational background or from former teacher, a continuum of alternative placements was not considered and a biased state consultant was utilized.

II. Whether an Individualized Education Program is responsive to the special educational needs of a hearing impaired child as required by the Education of the Handicapped Act and its federal regulations where the statement of educational performance relied solely on the test score of

the Peabody Individual Achievement Test, the percentage of time spent in the regular classroom and with support services was yet to be determined and only one of the special services providers had been trained to work with hearing impaired children.

III. Whether a local school system could provide an educational program which was "appropriate" to meet the special educational needs of a hearing impaired child pursuant to the Education of the Handicapped Act and its federal regulations where the evaluation and placement procedures and Individualized Education Program development were made upon unlawful procedures and the regular classroom teacher and all but one of her special service providers were not certified to teach children with hearing impairments.

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34 C.F.R. 300.551 28

OPINIONS

The opinion of the North Carolina Court of Appeals is reported at 58 N.C. App. 260, 293 S.E. 2d 687 (1982) and is printed in Appendix A hereto. The judgment of the North Carolina Supreme Court is unpublished and appears at Appendix B hereto. The Judgment of the Wilson County Superior Court is unpublished and is printed in Appendix C hereto. The decision of the State Review Officer appears at Appendix D hereto, and the decision of the Hearing Officer appears at Appendix E hereto.

JURISDICTION

The judgment of the North Carolina Court of Appeals (Appendix A) was entered on July 20, 1982. A timely notice of appeal and petition for discretionary review were denied by the North Carolina Supreme

Court on October 7, 1982. (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 USC §1257 (c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Education for All Handicapped Children Act of 1975 which is found in 20 USC §1401, et seq. The Act's pertinent text is printed in Appendix F.

Additionally, the federal regulations under Part B of the Education of the Handicapped Act are involved. These regulations are found at 34 CFR Part 300. The regulations' pertinent text is printed in Appendix G hereto.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States, which

provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was born deaf on December 20, 1964 (R pp 9, 54). She has a severe hearing impairment which has been diagnosed as a moderate to profound bilateral sensorineural hearing loss. Petitioner is a child with special needs entitled to a free appropriate publicly supported education pursuant to the Education for all Handicapped Children Act of 1975. (R p 103; Exhibit H-3).

From the time the Petitioner was a young child, her parents enrolled her in various oral programs for hearing impaired children. (R pp 9, 10, 27, 38; Exhibit H-8). She was enrolled at the Central Institute for the Deaf in St. Louis, Missouri, and had never been enrolled in the Wilson County School System when these

proceedings were begun. (R pp 27, 103, 128).

Mrs. Irene B. Harrell, mother of Petitioner, instituted these proceedings by sending a letter to Dr. W. O. Fields, Jr., Superintendent of the Respondent school system which requested an application for an education expense grant for the education of the Petitioner at the Central Institute for the Deaf. Said request was received on June 14, 1978. (R pp 13, 27, 103, 128; Exhibit S-1). This was the second such request for aid and assistance for the education of Petitioner. (R pp 12, 39; Exhibit H-8). Petitioner's mother returned the completed education expense grant application and accompanying records to the Respondent school system by letter dated July 14, 1978. (R p 29; Exhibit S-3).

The Respondent school system conducted an evaluation of Petitioner in order to determine whether or not an appropriate educational program was available to Petitioner in the Respondent school system. During the evaluation, evaluation forms were only partially completed, information was not obtained with regard to Petitioner's prior educational background or from former teachers, a continuum of alternative placements was not considered and a biased state consultant was utilized. The assessment, evaluation and placement procedure forms used by Respondent were not strictly followed during the assessment, evaluation and placement of Petitioner.

Form EC-1 is a teacher referral form. (Exhibit S-12, Form EC-1). Educational data, such as Petitioner's existing school

records, were not obtained for Form EC-1 nor for any of the other forms during the screening process. (Exhibit S-12).

Pupil observation is the focus of Form EC-2. (Exhibit S-12, Form EC-2). Petitioner was observed by a school psychologist at a conference on July 26, 1978 which was attended by Petitioner's mother and several other adults. At this conference, the psychologist noted that the Petitioner was able to use speech, language and speechreading skills. (Exhibit S-12, Form EC-2). No information was obtained with Petitioner in a classroom setting. Such important data as activity level, attention span and concertration in the classroom was not obtained either first-hand nor by contacting Petitioner's teachers at the Central Institute for the Deaf. (Exhibit S-12, Form

EC-2). No data was obtained with regard to Petitioner's socialization skills while interacting with her peers in the classroom. (Exhibit S-12, Form EC-2).

Form EC-3 is entitled Conference Report Completed by Referring Teacher, Principals, and Exceptional Child Teacher. The report on this form merely states "See conference report dated 7/29/78." Exhibit S-12, Form EC-3). However, the explanatory sheet for Respondent School System's Procedures for the Referral, Screening, Assessment, and Placement of Exceptional Children states that the information should relate to a consideration of the proper placement of the child. Said report is to be completed by "referring teacher, principals, and exceptional child teacher." (Exhibit S-12).

Educational functioning is to be evaluated and the data recorded on Form EC-4. Petitioner's educational functioning evaluation consists only of the Peabody Individual Achievement Test scores obtained by the school psychologist. However, neither Appellant's school records from the Central Institute for the Deaf nor samples of the work she had done there were included in her educational evaluation. (Exhibit S-12, Form EC-4).

The two conferences of August 11, 1978 and August 14, 1978 appear to be the only additional occurrences from the time of the psychological evaluation of August 4, 1978, as recorded on Form EC-4, to the decision of the placement committee to place Appellant in a "regular classroom with appropriate support services," as recorded on

Form EC-7 dated August 17, 1978. (Exhibit S-12, Forms EC-4 and EC-7). Form 4-A was completed by Appellant's mother on July 31, 1978, Form EC-5 was marked as "not applicable" and Form EC-6 was merely a parental permission form for psychological testing which had been given previously (Exhibit S-12, Forms 4-A, EC-5 and EC-6).

The purpose of the August 11 conference as stated on the conference report was "(t)o further discuss Marguerite's case in consultation with Mrs. Blackburn." (Exhibit S-9). Mildred Blackburn is a consultant for Programs for Hearing Impaired with the State Department of Public Instruction. Placing the Petitioner in the Respondent school system was mainly discussed at this consultative meeting even though the only tests or records Respondent school system

possessed with regard to Petitioner's educational functioning were the results of an achievement test which had been administered by the psychologist employed by Respondent school system. (Exhibit S-9 and S-12, Form EC-4). At the local hearing, Mrs. Blackburn stated, "I would not recommend a residential school for a hearing impaired child." (R p 85). A few sentences later she again expressed her opinion with regard to the placement of a hearing impaired child in a residential center.

> "I wouldn't say I would never recommend a residential program. But I would say at this point in time that a child would almost have to be a vegetable. The kind of child who really has no hope for a

> normal life at all, for living, loving, you know, being involved in a home." (R p 85).

The August 11, 1978 conference report states that "(t)he most frequently discussed placement alternative was one in which Marguerite would attend the public school system in Wilson County," and then goes on to disclaim "although this discussion does not imply that such a placement had been decided upon by anyone involved." The report then goes on to enumerate a number of recommendations to be followed in case placement in the public school system is decided upon. There is nothing in the conference report to show that there was any discussion of other options. (Exhibit S-9).

The conference report of August 14, 1978 also shows that the full realm of possible placement alternatives was not being considered. This report states, "The possible placement alternatives were discussed by all members present, ranging from a public school setting with support services to ENCSD (Eastern North Carolina School for the Deaf) placement to placement in a public school program outside Wilson County." (Exhibit S-10). The Eastern North Carolina School for the Deaf is a "total communication" residential school which employs the use of finger-spelling and sign-language. The alternatives mentioned do not include the possibility of placement in a strictly "oral/aural" residential school where sign language is not used, although this is the type schooling Petitioner had been attend-

ing for the past five years. (Exhibit S-10).

Form EC-7 also recommends a meeting with Petitioner's parents so that an IEP (Individualized Education Program) can be developed for Petitioner (Exhibit S-12, Form EC-7). Said IEP conference was held on August 22, 1978. The purpose of the conference as described by the conference report is "To discuss with Mrs. Harrell and get her input into the development of an individualized education plan (IEP) and necessary support services for Marguerite to attend the Wilson County school system in the 1978-79 year." (Exhibit S-11). This shows that Petitioner's placement in a regular sixth grade classroom had already been determined and was no longer open to discussion. However, the reason for this confer-

ence was to determine Petitioner's special needs and to decide what support services would then be required to meet those special needs. (Exhibit S-11).

Form EC-9 is a committee report to the administrative review committee which recommends that Appellant be placed in a "regular sixth grade with related services of speech therapist, resource teacher and psychologist." The form additionally states that the "(r)easons for this recommendation can be found on forms EC-1 through EC-9." (Exhibit S-12, Form EC-9). This form is dated August 22, 1978 although the IEP was not completed until August 28, 1978. (Exhibit S-12, Form EC-8 and Form EC-9). Form EC-10 dated August 28, 1978, is the administrative review committee recommendation which also recommends that appellant be

placed in a regular sixth grade class with support services. (Exhibit S-12, Form EC-10).

Respondent school system decided it could provide an appropriate educational program for Petitioner by placing her in a regular sixth grade classroom with supportive services. An Individualized Education Program was developed for the Petitioner which relied solely on the test scores of the Peabody Individual Achievement Test which had been administered by the Respondent school system, the percentage of time spent in the regular classroom and with support services was yet to be determined and only one of the special services providers had been trained to work with hearing impaired children. Petitioner's application for an educational expense grant was

subsequently denied.

The Individualized Education Program (IEP) developed for Petitioner was not properly developed. The Respondent school system's statement of educational performance relies solely upon the Peabody Individual Achievement Test scores which had been administered to the Petitioner by the Psychologist employed by the Respondent school system. (Exhibit S-12, Form EC-8, IEP).

Short term objectives are merely stated "1. Speach Therapy, II, Classroom aide, III. Phonic ear and IV. Resource teacher." (Exhibit S-12, Form EC-8, IEP). The IEP states that the percentage of time spent with support services and the percentage of time spent in the regular classroom is "to be determined by child's needs."

(Exhibit S-12, Form EC-8, IEP).

Of the personnel responsible for either teaching the Petitioner or providing special services to her, only Rosalee Wooten, the resource teacher, was trained to work with hearing impaired children. (R p 110). However, at the local hearing, Ms. Wooten stated that she was currently serving sixteen children and that another resource teacher would need to be hired should Petitioner require much time with a resource teacher. (R p 95). The school system's psychologist, Paul Speziale, who would presumably be Petitioner's psychologist, interpreted Petitioner's IQ scores in a manner which was inappropriate for a child with a hearing impairment (R p 120) and Gloria Ellis, the speech therapist who was to provide speech therapy to Peti-

tioner, was not sure how to communicate with a hearing impaired child. (R pp 92, 117). So, the "experts" who were to provide special services to Petitioner were either overloaded with children for whom they were to provide services or knew practically nothing about hearing impaired children. The regular classroom teacher was not certified in the education of hearing impaired children. (R p 110). Lack of familiarity with the education and the special needs of hearing impaired children indicate the personnel assigned to provide either regular or special services to Petitioner would have been unable to provide for her special needs.

Petitioner requested a hearing, which was held on October 11, 1978. (R pp 34-101). The hearing officer found that

the Respondent school system could provide an appropriate education for Petitioner in its public schools. (R pp 30, 111-112). Petitioner's parents appealed the hearing officer's decision to the State Education Agency. (R pp 30, 112-116). A state review hearing was held on December 20, 1979. (R pp 30, 116-124). The state review officer upheld the decision of the local hearing officer. (R pp 31, 132).

WHERE FEDERAL QUESTIONS WERE RAISED

Petitioner's petition for judicial review to the Wilson County Superior Court stated that Respondent school systems findings, inferences, conclusions and decisions were in excess of statutory authority, affected by error of law, unsupported by the evidence, arbitrary or capricious and violative of the constitutional right to due

process. Using the "whole record" test, the court affirmed the decisions of the hearing officer and the review officer.

The three federal questions sought to be reviewed were raised by exceptions and assignments of error in the North Carolina Court of Appeals.

The due process part of the first issue was dealt with at 58 N.C. App. 260, 265-267. Regarding this issue, the Court of Appeals found that "the predisposition or professional theory which Mrs. Blackburn had, and brought to the Committee, was not enough to constitute bias and a violation of due process." Id., at 267.

The remainder of the first issue deals with the procedures followed during the assessment, evaluation and placement of the Petitioner. The Court of Appeals found

that "the Wilson School System conducted the required screening and evaluation of Marguerite." Id., at 269-270. While discussing both the assessment of Petitioner as well as the IEP formulated for her, the Court stated: "It is clear to us that the school system complied with the applicable regulations." Id., at 270.

Additionally, the Court of Appeals found that the Respondent school system was not required to obtain information with regard to Petitioner's prior educational background or from former teachers.

> "[T]he regulations do not require, as plaintiff suggests, that the records from the CID, her report cards, and work samples be considered by the committee as it reached its

> decision. The statutes and regulations require that a multi-disciplinary diagnosis and evaluation be performed by the school system. (Cites omitted.) This the school system did." 58 N.C. App. at 271.

With regard to the lack of consideration of a continuum of alternative placements, the Court of Appeals noted that "several alternatives were discussed." Id., at 270.

The second issue deals with the Individualized Education Program which was developed for the Petitioner. The Court of appeals found no merit to the argument that the statement of educational performance

relied solely on the Peabody Individual Achievement Test. 58 N.C. App. at 271. It also found that while the percentage of time to be spent in the regular classroom and with support personnel should have been more specifically determined, it was the opinion of the Court that "the answers were sufficient." Id., at 272.

The Court of Appeals did not specifically address the problem addressed in both questions two and three concerning the fact that Petitioner's regular classroom teacher and all but one of her special service providers were not qualified to teach children with hearing impairments. The Court did, however, state that the placement of Petitioner in a regular classroom with support services was consistent with federal regulations. 58 N.C. App. at

270-271.

The crux of the third issue deals with whether or not the educational program offered to Petitioner was appropriate. This question was addressed by the Court of Appeals in light of the United States Supreme Court decision in Board of Education v Rowley, 50 U.S.L.W. 4925 (28 June 1982). 58 N.C. App. at 264. The Court of Appeals found that the Respondent school system had fulfilled its obligation to provide a free, appropriate education to Petitioner and "that the decision was not affected by error of law. Id., at 265."

REASONS FOR GRANTING THE WRIT

In Board of Education v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982) this Court first addressed the requirements which must be met to comply with the Education for All

Handicapped Children Act. The Rowley Court set forth the issues which must be considered by a Court reviewing the state administrative findings and decisions in a civil action pursuant to 20 U.S.C. §1415(e)(2). Petitioner asserts that the reviewing Courts in the case sub judice have failed to follow the guidelines for review which must be followed.

The Rowley Court directed that judicial review of the administrative actions should concentrate on two questions.

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child

to receive educational benefits?" 102 S.Ct. at 3051.

Petitioner asserts that the answer to the first question is "No." Assessment, evaluation and placement procedures were not properly followed during the assessment evaluation and placement of Petitioner.

The evaluation forms used by Respondent school system were only partially completed. ((Exhibit S-12). No data was obtained from Petitioner's teachers at the Central Institute for the Deaf with regard to Petitioner's academic performance, socialization skills or adaptive behavior. (Exhibit S-12, Forms EC-1, EC-2, EC-3, EC-4). Teacher recommendations, social background and adaptive behavior should be included in evaluation and placement proce-

ures. 34 C.F.R. 300.533(a)(1).

Petitioner's educational functioning evaluation consists only of the Peabody Achievement Test Scores. (Exhibit S-12, Forms EC-4, EC-3). These scores were interpreted inappropriately for a child with a hearing impairment. (R p 120). 34 C.F.R. 300.532 deals with evaluation procedures. It states that test results for a child with a sensory impairment should "accurately reflect the child's aptitude or achievement level...rather than reflecting the child's impaired sensory...skills...."

A continuum of alternative placements is mandated by 34 C.F.R. 300.551. Instruction in an institution should be an included alternative placement. 34 C.F.R. 300.551(b)(1). However, an oral-aural school such as the on Petitioner had been

attending was not considered. (Exhibits S-9, S-10). This may be explained in part by the bias of Mildred Blackburn, a consultant for Programs for Hearing Impaired with the State Department of Public Instruction. Mrs. Blackburn stated at the local hearing that she "would not recommend a residential school for a hearing impaired child." (R p 85).

The Individualized Education Program (IEP) prepared for a handicapped child must include, among other items, the child's educational performance levels as well as a statement of the amount of time the child is to be in the regular classroom and the percentage of time the child is to receive special services. 34 C.F.R. 300.346. However, the Respondent school system's statement of educational performance relies

solely upon the Peabody Individual Achievement Test scores which have been discussed previously. (Exhibit S-12, Forms EC-4, EC-8, IEP). In addition, the IEP states that the percentage of time to be spent in the regular classroom and the percentage of time to be spent with special services is "to be determined by the child's needs." (Exhibit S-12, Form EC-8, IEP).

Petitioner submits that since the procedures followed during the assessment, evaluation and placement of Petitioner as well as the IEP procedures were improper, that the substance of Petitioner's educational programs which was based on these procedures was also improper.

In the case sub judice, the North Carolina Court of Appeals found that the procedures of the Act had been adequately

followed and that the Respondent school system could provide an appropriate education for the Petitioner. The Petitioner asserts that this decision is in conflict with the decision of the Rowley Court since the procedural requirements of the Act were not properly followed. The Procedural conflicts should be resolved by this Court in order to establish a uniform approach to judicial review of the Act's procedures.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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